Petition

81-1263

No.....

Office - Supreme Court, U.S.
FILED
JAN 6 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DEVON CORPORATION, a corporation, EASON OIL COMPANY, a corporation, and P & O OIL CORPORATION, a corporation,

Petitioners,

v.

WALTER N. MILLER, Director, West Virginia Department of Mines, ROBERT L. DODD, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and THOMAS E. HUZZEY, Commissioner, West Virginia Oil & Gas Conservation Commission,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Paul N. Bowles
Phyllis M. Potterfield
Counsel of Record for Petitioners
BOWLES, McDAVID, GRAFF & LOVE
1200 Commerce Square
P. O. Box 1386
Charleston, WV 25325
Telephone (304) 344-9621

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

QUESTIONS PRESENTED

(1) Are West Virginia Code § 22-4A-7(b)(4) and the pertinent regulations promulgated to implement that statutory provision, requiring the separate, specific written consent and easement by the current owner or owners of the surface for the location and drilling of a "deep" gas or oil well, invalid under the Constitution of the United States, as applied to the facts of this case, in that such statute and regulations impair contractual obligations vested prior to the enactment and effective date of the statute and regulations?

(2) Are West Virginia Code § 22-4A-7(b)(4) and the pertinent regulations promulgated to implement that statutory provision, requiring the separate, specific written consent and easement by the current owner or owners of the surface for the location and drilling of a "deep" gas or oil well, invalid under the Constitution of the United States, in that enforcement of the statute and regulations, under the facts of this case, amounts to the taking of vested property interests without due process of law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
INDEX TO AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	4
Summary	4
Statement of the Facts	5
The Circuit Court Decision	8
The Supreme Court of Appeals Decision	9
REASONS FOR ALLOWANCE OF THE WRIT	11
Summary of Argument	11
Background	11
Obligation of Contract	13
Taking of Property	15
Decisions by Other State Courts of Last Resort	17
Conclusion	19
CONCLUSION	21
APPENDIX A—OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA	1a

Page

APPENDIX B—ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 13a

APPENDIX C—NOTICE FROM THE OIL & GAS CONSERVATION COMMISSION, STATE OF WEST VIRGINIA 20a

APPENDIX D—ORDER OR DECREE OF THE SUPREME COURT OF APPEALS WEST VIRGINIA 23a

APPENDIX E—ORDER OF SUPREME COURT OF APPEALS OF WEST VIRGINIA DENYING PETITION FOR REHEARING 25a

INDEX TO AUTHORITIES

Cases	Page
Adkins v. *United Fuel Gas Co.*, 134 W.Va. 719, 61 S.E.2d 633 (1950)	12
Agins v. *Tiburon*, 447 U.S. 235 (1980)	16
Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978)	14
Arbaugh v. *Raines*, 155 W.Va. 409, 184 S.E.2d 620 (1971)	12
Boggess v. *Milam*, 127 W.Va. 654, 34 S.E.2d 267 (1945)	11
Central Oil Co. v. *Shows*, 246 Miss. 300, 149 So.2d 306 (1963)	12
Chicago and Northwestern Transportation Company v. *Pedersen*, 80 Wis.2d 566, 259 N.W.2d 316 (1977)	12
Consolidated Gas Supply Corp. v. *Riley*, ...W.Va. ....., 247 S.E.2d 712 (1978)	11
Department for Natural Resources and Environmental Protection v. *No. 8 Limited of Virginia*, 528 S.W.2d 684 (Ky. 1975)	15, 17, 18, 20
Doochin v. *Rackley*, 610 S.W.2d 715 (Tenn. 1981)	18, 20
Edgar A. Levy Leasing Company v. *Siegel*, 258 U .S. 242 (1922)	14
El Paso v. *Simmons*, 379 U.S. 497 (1965)	14
Flying Diamond Corp. v. *Rust*, 551 P.2d 509 (Utah 1976)	12
Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962)	15
Hodel v *Virginia Surface Mining and Reclamation Assoc., Inc.*, ...U.S..... (1981)	16, 20

Cases	Page
Home Building & Loan Assoc. v. *Blaisdell*, 290 U.S. 398 (1934)	14
Hudson Water Co. v. *McCarter*, 209 U.S. 349 (1908)	15
Hurley v. *Northern Pacific Railway Co.*, 153 Mont. 199, 455 P.2d 321 (1969)	12
Lindsey v. *Wilson*, 332 S.W.2d 641 (Ky. 1960)	12
Manigault v. *Springs*, 199 U.S. 473 (1905)	14
Manufacturers' Light & Heat Co. v. *Knapp*, 102 W. Va. 308, 135 S.E. 1 (1926)	11
Paxton v. *Benedum-Trees Co.*, 80 W.Va. 187, 94 S.E. 472 (1917)	13
Penn Central Transportation Co. v. *City of New York*, 438 U.S. 104 (1978)	15
Pennsylvania Coal Company v. *Mahon*, 260 U.S. 393 (1922)	12, 16
Pickens v. *Adams*, 7 Ill.2d 283, 131 N.E.2d 38 (1956)	12
Preston v. *White*, 57 W.Va. 278, 50 S.E. 236 (1905)	11
Short v. *Texaco, Inc.*, 406 N.E.2d 625 (Ind. 1980), juris. noted, *Texaco, Inc.* v. *Short*, U.S. (1981)	18, 19, 20
Squires v. *Lafferty*, 95 W.Va. 307, 121 S.E. 90 (1924)	12
Texaco, Inc. v. *Parker*, 373 S.W.2d 870 (Tex. Civ. App. 1963)	12
Triegle v. *Acme Homestead Assoc.*, 297 U.S. 189 (1936)	14
Trustees of Tufts College v. *Triple R Ranch, Inc.*, 275 So.2d 521 (Fla. 1973)	12

Cases Page

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977) 14

Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365 (1926) 15

Williamson v. *Jones*, 39 W.Va. 231, 19 S.E. 436 (1894) 11

Wiser Oil Co. v. *Conley*, 346 S.W.2d 718 (Ky. 1961) 12

Constitutional Provisions

U. S. Const. Art. 1 § 10 ..... 3, 8, 13

U. S. Const. Amend. V 15

U. S. Const. Amend. XIV 3, 8, 15

Statutes

Mont. Code Ann. § 82-4-224 (1981) 20

28 U.S.C. § 1257(3) 2

West Virginia Code § 22-4-1k 4, 7

West Virginia Code § 22-4A-2 ..... 7, 16

West Virginia Code § 22-4A-7 ..... i, 3, 7, 8, 9, 10, 13, 16, 19

Wyo. Stat. Ann. § 35-11-406(b)(xii) (Supp. 1981) 17, 20

Administrative Regulations

West Virginia Administrative Regulations, Oil & Gas Conservation Commission, (Chapter 22-4A), Rule 3.04 (1979 Ed.) 3, 4, 7, 9, 10

Others

E. KUNTZ, OIL & GAS (1962) 12

W. SUMMERS, OIL & GAS (1962) 12

No.....

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DEVON CORPORATION, a corporation, EASON OIL COMPANY, a corporation, and P & O OIL CORPORATION, a corporation,

Petitioners,

v.

WALTER N. MILLER, Director, West Virginia Department of Mines, ROBERT L. DODD, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and THOMAS E. HUZZEY, Commissioner, West Virginia Oil & Gas Conservation Commission,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Devon Corporation,[1] Eason Oil Company,[2] and P & O

---

[1]Petitioner Devon Corporation, formerly an Oklahoma corporation, was merged with and into Devon Energy Corporation, a Nevada corporation, the survivor, effective June 25, 1981. All subsidiaries of Devon Energy Corporation are wholly owned by that corporation. Devon Energy Corporation is the general partner in the following Oklahoma limited partnerships: Devon Production No. 1, Devon Production No. 2, Devon Production No. 3, Devon Production No. 4, Devon 1978 Program, Devon 1979 Program, Devon 1980 Program and Devon 1981 Program.

[2]Petitioner Eason Oil Company is a Delaware corporation and a wholly owned subsidiary of International Telephone & Telegraph Corporation. All subsidiaries of Eason Oil Company are wholly owned by that corporation.

Oil Corporation[3] hereby petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia, enabling this Court to review the judgment of that court in *Devon Corporation* v. *Miller*, ...W. Va. ....., 280 S.E.2d 108 (1981).

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is printed in the appendix as Appendix A, pp. 1a-12a. Although the decision is not yet officially published in the West Virginia Reports, it appears at 280 S.E.2d 108 (W. Va. 1981). The order of the Circuit Court of Kanawha County, West Virginia, denying the writ of mandamus sought by petitioners is not reported, but is printed in the appendix as Appendix B, pp. 13a-19a. The notice from the Oil & Gas Conservation Commission, State of West Virginia, to Petitioners informing them that their application for a permit to drill a "deep" well had been denied is not reported, but is included in the appendix as Appendix C, pp. 20a-22a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on July 9, 1981. A petition for rehearing was timely filed on August 6, 1981; rehearing was denied by order entered October 8, 1981. This Court has jurisdiction to review the judgment or decree in question by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

---

[3]Petitioner P & O Oil Corporation, a Delaware corporation, no longer has any interest in this litigation having assigned all of its right, title and interest in and to all property, real, personal or mixed situated in the State of West Virginia to Devon Corporation (now Devon Energy Corporation) by conveyance dated October 14, 1978.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

(1) Article I, Section 10 of the Constitution of the United States, provides, in part, as follows:

> "No state shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

(2) Amendment XIV of the Constitution of the United States provides, in part, as follows:

> ". . . no state shall make or enforce any law which shall . . . deprive any person of . . . property without due process of law. . . ."

(3) West Virginia Code § 22-4A-7(b)(4) provides as follows:

> "No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefor, duly acknowledged and placed of record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy which consent and easement shall be submitted by the operator to the commission."

(4) West Virginia Administrative Regulations, Oil & Gas Conservation Commission, (Chapter 22-4A), Rule 3.04 (1979 Ed.), provides as follows:

> "All applications submitted to the Deputy Director for Oil & Gas for a permit to drill, redrill, stimulate, operate, plug, abandon, deepen, case, fracture, pressure, convert, or combine any deep well, or physically change any deep well to allow the migration of fluid from one formation to an-

other shall be reviewed by the Commissioner or by an authorized agent to ascertain compliance with these rules and regulations. The Commissioner will provide the Deputy Director for Oil & Gas with a statement either approving or disapproving the application based upon its compliance with Oil & Gas Conservation rules and regulations and the statutes. The permit will be issued by the Deputy Director for Oil & Gas when the applicant has complied with all rules and regulations. The application shall contain, or show by plat or sketch, in addition to the requirements of § 22-4-1k, and administrative rules and regulations promulgated thereunder:

(a) a certificate of consent and easement from all owners of the surface of the tract on which the deep well is to be drilled, and;

. . . ."

STATEMENT OF THE CASE

Summary

Devon Corporation, Eason Oil Company and P & O Oil Corporation [hereinafter "Petitioners"], all engaged in the business of exploration, production and sale of oil and natural gas throughout the State of West Virginia and the United States, brought this action in the Circuit Court of Kanawha County, West Virginia, seeking a writ of mandamus, commanding the Director of the West Virginia Department of Mines, the Deputy Director of the Oil & Gas Division of that department, and the Commissioner of the West Virginia Oil & Gas Conservation Commission [hereinafter "Respondents"] to grant to the Petitioners the necessary permit to drill a deep well upon a 96-acre tract of land under lease to them.

Petitioners asserted to the Circuit Court that the enforcement by state officials of certain statutory and regu-

latory provisions, requiring a surface owner's consent and easement prior to the issuance of a permit to drill a deep well, impaired preexisting contractural obligations and effectively deprived Petitioners of their vested property rights without due process of law; that the statute and regulations were unconstitutional as applied to the facts of their case; and that the officials should be ordered to issue the permit without regard to compliance with the unconstitutional provisions.

The Circuit Court of Kanawha County, West Virginia, rejected the constitutional arguments and denied the writ of mandamus. The action of the Circuit Court was affirmed by the West Virginia Supreme Court of Appeals. Believing that the West Virginia Supreme Court of Appeals has decided important questions of federal constitutional law in conflict with the applicable decisions of this Court and with the decisions of other state courts of last resort, Petitioners pray that a writ of certiorari be granted in this case.

Statement of the Facts

The instant case concerns a 96-acre tract of land on the waters of Horse Cave Run, Ripley District, Jackson County, West Virginia. Prior to 1924, title to the mineral interests and surface of the tract was vested in the same owners. However, by deed dated August 23, 1924, the then owners, John Kay and Edna G. Kay, his wife, transferred and conveyed to J. A. Friese title to an undivided one-half interest in the oil and gas in and underlying the tract of land, which conveyance included the right to use so much of the surface as is reasonably necessary to recover the minerals.[4] Mr. and Mrs. Kay retained title to

[4]See discussion in text at notes 9-11, *infra*.

the other undivided one-half interest in the oil and gas and to the surface.

In 1968, Lottie Barnette, as successor in title to John and Edna G. Kay, was the owner of the whole of the surface and an undivided one-half interest in the oil and gas, earlier reserved by the Kays. By lease dated October 9, 1968, Ms. Barnette leased to Commonwealth Gas Corporation her undivided one-half interest in the oil and gas in and underlying the subject tract. With respect to use of the surface by the mineral lessee, the lease specifically provided that Ms. Barnette, as lessor:

> "Does lease and let unto the said lessee, with covenants of general warranty, all the Oil and Gas in and under the premises hereinafter described, together with the right-of-way over said premises for the purpose and with the exclusive right to enter thereon at any time to drill and operate wells for oil, gas and water and to erect, maintain and occupy, repair and remove all buildings, telephone poles and wires, structures, pipelines, machinery and appliances that the lessee may see fit to install thereon for the production and transmission of oil, gas and water thereon from this and other leases, and the transportation of oil, gas and water upon and over said premises and highways along the same. . . ."

Petitioners are successors in title of Commonwealth Gas Corporation in that lease by assignment made by Commonwealth Gas Corporation in June, 1973.

Title in the other undivided one-half interest in the oil and gas, along with the right to use the surface to extract that oil and gas, which had been severed from the surface in 1924, remained in J. A. Friese until his death, and then in his devisees, Belle Friese, Doris P. Elecker, and Betty L. Nuzum. On August 1, 1978, Belle Friese and Betty L.

Nuzum entered into an agreement with Petitioners, leasing to them their interest in the oil and gas in and underlying the subject surface. Similarly, on the same date, by separate agreement, Doris P. Elecker leased her interest in the oil and gas to Petitioners.

Following execution of the August 2, 1978, lease agreements, Petitioners became, and presently are, the lessees of all the oil and gas in and underlying the subject 96-acre tract. On August 21, 1978, Petitioners filed with the Oil & Gas Division of the West Virginia Department of Mines an application for a permit to drill a "deep" well, as defined in West Virginia Code § 22-4A-2(a)(13), on the 96-acre tract of land.[5] The application filed was complete in all respects, except that it did not include the written consent and easement executed and acknowledged by the owners of the surface, as required by West Virginia Code § 22-4A-7(b)(4) and by Rule 3.04 of the Administrative Regulations of the Oil & Gas Conservation Commission of the State of West Virginia. By letters dated August 21, 1978 and September 1, 1978, the Oil & Gas Conservation Commission denied the application to drill a "deep" well. The *sole* basis for that denial was the failure of the Petitioners to attach the required written consent and easement. A copy of the notice from the Commission to Petitioners is printed in the appendix as Appendix C, pp. 20a-22a.

---

[5]West Virginia Code § 22-4-1k requires a person intending to drill a well for oil or gas to file an application for a permit with the Deputy Director, West Virginia Department of Mines, Division of Oil & Gas. If the proposed well is to be "drilled and completed in a formation at or below the top of the uppermost member of the 'Onondaga Group' or at a depth of or greater than six thousand feet, whichever is shallower," West Virginia Code § 22-4A-2(a)(13), it is classified as a "deep well" and is subject to additional statutory provisions, including West Virginia Code § 22-4A-7(b)(4), the constitutionality of which is at issue in this case.

The Circuit Court Decision

Following the Respondents' refusal to issue a permit, Petitioners filed with the Circuit Court of Kanawha County, West Virginia, a petition for writ of mandamus, asserting, in part, as follows:

"

XIII.

Petitioners contend that § 22-4A-7(b)(4) is unconstitutional in that it violates Article I, § 10, of the United States Constitution, [Amendment] XIV of the United States Constitution, and Article III, Sections 1 and 10, of the Constitution of West Virginia.

XIV.

Because of the unconstitutional statutory requirement imposed by § 22-4A-7(b)(4) of the West Virginia Code, the Petitioners are deprived of the benefit of their contractural agreement with the lessor Lottie S. Barnette.

XV.

Because of the unconstitutional statutory requirement imposed by § 22-4A-7(b)(4) of the West Virginia Code, it is impossible for the Petitioners to develop the oil and gas underlying the said 96-acre tract below the uppermost member of the 'Onondaga Group'."

On December 21, 1978, after submittal by counsel of memoranda, briefs, stipulations and argument, the Circuit Court of Kanawha County, West Virginia, issued a letter of memorandum opinion rejecting the Petitioners' constitutional arguments. On January 16, 1979, a formal order, including findings of fact and conclusions of law,

was issued, likewise rejecting the constitutional arguments and denying the writ of mandamus. The Circuit Court's order, together with the letter of memorandum opinion annexed to and made a part thereof, are printed in the appendix as Appendix B, pp. 13a-19a.

The Supreme Court of Appeals Decision

Following denial of relief by the Circuit Court, Petitioners filed a petition for appeal and supersedeas with the West Virginia Supreme Court of Appeals. Included as assignments of error in that petition were the following:*

> "1. The lower court erred in failing to find that the requirements imposed by § 22-4A-7(b)(4) of the West Virginia Code, as amended, and of Rule 3.04 of the Operational Rules of the Oil & Gas Conservation Commission of the State of West Virginia, are in violation of both the Federal and State constitutions because that section and regulation as applied to the facts of this case impair the obligation of contract preexisting the enactment of the statute and regulation.
>
> 2. The lower court erred in failing to find that the requirements imposed by § 22-4A-7(b)(4) of the West Virginia Code, as amended, and of Rule 3.04 of the Operational Rules of the Oil & Gas Conservation Commission of the State of West Virginia, are in violation of both the Federal and State constitutions because enforcement of that

*Petitioners' third assignment of error is not presented to this Court since it involved a question of state law only, i.e. whether the Legislature intended West Virginia Code § 22-4A-7(b)(4) to apply to any wells other than those related to drilling units established or formed under West Virginia Code § 22-4A-7. It is noted, however, that if the statute had been so narrowly interpreted any constitutional problems would have been minimized. In a drilling unit situation, the surface is used not just for the purposes of oil or gas underlying the particular tract, but also for oil or gas underlying adjacent tracts. Since generally a surface owner or predecessor in title has earlier consented only to use of the surface for purpose of the minerals under that specific parcel, additional compensation for or consent to the broader use may be justified.

> statute and regulation under the facts of this case would amount to the taking of property of the Petitioners and their lessors without due process of law.
>
> . . . .
>
> 4. For the above stated reasons, the lower court erred in refusing to grant the Petitioners' petition for a writ of mandamus."

On April 10, 1979, the West Virginia Supreme Court of Appeals issued an order allowing a writ of error and supersedeas. The case was subsequently argued and submitted for decision upon the stipulations, exhibits, and other matters of record, upon briefs and arguments of counsel, and upon the brief on behalf of *amicus curiae*.[7]

On July 9, 1981, the West Virginia Supreme Court of Appeals issued its opinion affirming the decision of the Circuit Court of Kanawha County, West Virginia. The holding of the Court was summarized, in conclusion, as follows:

> "Upon the facts presented to us, this Court concludes that W. Va. Code, 22-4A-7(b)(4), and Rule 3.04 of the Operational Rules of the West Virginia Oil & Gas Conservation Commission do not unconstitutionally impair the obligation of contract or constitute the taking of petitioners' property without due process of law."

The opinion of the West Virginia Supreme Court of Appeals is printed in full in the appendix as Appendix A, pp. 1a-19a.

A rehearing was timely sought on behalf of Petitioners. On October 8, 1981, the West Virginia Supreme Court

---

[7]The Oil and Gas Reform Coalition, an unincorporated association, along with Hallie Mae Johnson and Timothy P. Higgins, owners of interests in surface estates subject to out conveyances or leases of mineral interests, were granted leave to file a brief as *amicus curiae* with the West Virginia Supreme Court of Appeals.

of Appeals issued an order denying rehearing. A copy of the order denying rehearing is printed in the appendix as Appendix E, p. 25a. The last day for filing this petition for writ of certiorari is January 6, 1982, the ninetieth (90th) day following the denial of rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

Summary of Argument

If the statutory and regulatory provisions, requiring the specific consent and easement of the surface owners as a condition precedent to the issuance of a permit to drill a deep well for oil or gas, are applied to the facts of this case, and to similar factual situations, Petitioners, and other operators of oil and gas wells, as well as owners of oil and gas in place, will be required to pay a second time to secure rights for which the surface owner or his predecessor in title have already been compensated, and may, if the surface owner refuses to give his consent at any price, be entirely excluded from recovering minerals which they have a vested right to extract. The result will be to fundamentally alter the legal rights of private parties without achieving any substantial public purpose and without compensating those who have been divested of the benefit of their bargain and of their property interests.

Background

Under West Virginia law, it is well-established that mineral rights, including oil and gas, are an interest in land which may be created or transferred as any other estate in land.[6] In this state, as in other jurisdictions,

---

[6] *See, e.g., Consolidated Gas Supply Corp.* v. *Riley*, ____W.Va.____, 247 S.E.2d 712 (1978); *Boggess* v. *Milam*, 127 W.Va. 654, 34 S.E.2d 267 (1945); *Manufacturers' Light & Heat Co.* v. *Knapp*, 102 W.Va. 308, 135 S.E. 1 (1926); *Preston* v. *White*, 57 W.Va. 278, 550 S.E. 236 (1905); *Williamson* v. *Jones*, 39 W.Va. 231, 19 S.E. 436 (1894).

when the mineral interests are severed from the surface fee, separate and distinct estates are created with correlative rights to the enjoyment of those estates.[9] Since ownership of oil, gas or other minerals in place would be worthless without the right to extract them from the ground,[10] the law has long recognized that even in the absence of any explicit agreement between surface and mineral owners, the mere fact of mineral ownership carries with it the right to use so much of the surface as is reasonably necessary to recover the minerals.[11] As summarized in *Squires* v. *Lafferty*, 95 W. Va. 307, 309, 121 S.E. 90, 91 (1924):

> "[A mineral owner] has also as incident to this ownership the right to use the 'surface' of the land in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate. [Citations omitted].
>
> This rule is based upon the principle that, when a thing is granted, all the means to obtain it and all the fruits and effects of it are also granted."

Applying these general principles to the facts of this case, it becomes clear (1) that in 1924 when the prede-

---

[9] *See, e.g., Trustees of Tufts College* v. *Triple R Ranch, Inc.*, 275 So.2d 521 (Fla. 1973); *Pickens* v. *Adams*, 7 Ill.2d 283, 131 N.E.2d 38 (1956); *Lindsey* v. *Wilson*, 332 S.W.2d 641 (Ky. 1960); *Arbaugh* v. *Raines*, 155 W.Va. 409, 184 S.E.2d 620 (1971); *Adkins* v. *United Fuel Gas Co.*, 134 W.Va. 719, 61 S.E.2d 633 (1950); *Chicago and North Western Transportation Company* v. *Pedersen*, 80 Wis.2d 566, 259 N.W.2d 316 (1977); 1 E. KUNTZ, OIL AND GAS § 3.1 (1962); 4 W. SUMMERS, OIL AND GAS § 652 (1962).

[10] *See, Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393, 414 (1922), where Justice Holmes aptly stated that "[f]or practical purposes the right to coal consists of the right to mine it." The same is equally true of the right to oil and gas.

[11] *See, e.g., Wiser Oil Co.* v. *Conley*, 346 S.W.2d 718 (Ky. 1961); *Lindsey* v. *Wilson*, *supra* note 9; *Central Oil Co.* v. *Shows*, 246 Miss. 300, 149 So.2d 306 (1963); *Hurley* v. *Northern Pacific Railway Co.*, 153 Mont. 199, 455 P.2d 321 (1969); *Texaco, Inc.* v. *Parker*, 373 S.W.2d 870 (Tex. Civ. App. 1963); *Flying Diamond Corp.* v. *Rust*, 551 P.2d 509 (Utah 1976); *Adkins* v. *United Fuel Gas Co.*, *supra* note 9; 1 E. KUNTZ, *supra* note 9, § 3.2; 4 W. SUMMERS, *supra* note 9, § 652.

cessors in title to the present surface owners severed from the surface a one-half undivided interest in the oil and gas in and underlying the 96-acre tract of land, they also granted to the new owners of that one-half undivided interest the right to use the surface for the purpose of extracting the oil and gas, and (2) that following the 1968 lease of the remaining one-half undivided interest in oil and gas, *together with* the right to use the surface to drill and operate wells, the surface owners or their predecessors in title had been paid in full for surface rights incident to the underlying oil and gas. Accordingly, at any time after execution of that 1968 lease, the lessee, or his assignee, and the owner of the other undivided one-half interest, severed from the surface in 1924, could have come to an agreement to mine the property and, without any additional consent from or consideration to the owner of the surface, could have lawfully entered upon the property and used so much of the surface as was reasonably necessary to extract the oil and the gas. As more fully discussed below, the passage of West Virginia Code §22-4A-7(b)(4) in 1972, with an effective date of March 9. 1972, should not be permitted to divest those persons of that right.[12]

Obligation of Contract

Article I, Section 10, of the United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Although this Court has long recognized that the constitutional prohibition

---

[12]Although it is true as the lower courts stated that the owner of an undivided one-half (½) interest in oil and gas, or his lessee, cannot operate the property unless he joins with, or obtains the interest of, the owner of the other undivided one-half (½) interest, see *Paxton v. Benedum-Trees Co.*, 80 W.Va. 187, 94 S.E. 472 (1917), each party nevertheless has a *vested* right to use the surface jointly with the owner of the other one-half interest. The surface owner has no reserved right to prevent such joint operation.

against impairment of contract is not absolute,[13] it has recently cautioned that the guarantee "must be understood to impose *some* limits upon the power of a State to abridge existing contractural relationships, even in the exercise of its otherwise legitimate police powers."[14] As Justice Roberts, speaking for the Court forty-five years ago in *Treigle* v. *Acme Homestead Association*, 297 U.S. 189, 197 (1936), stated so well:

> "Though the obligations of contract must yield to a proper exercise of the police power, and vested rights cannot inhibit the proper exertion of the power, it must be exercised for an end which is in fact public and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

Analysis of impairment cases is a two-step process: first, a determination of whether contractual obligations have indeed been impaired; and second, a determination of whether that impairment is constitutionally justified.

In the instant case, it is clear that contractual obligations have been impaired. Prior to the passage of the 1972 statute, the owners of the surface were already obligated to permit the use of the surface for the production of oil and gas. The effect of the 1972 statute is to sanction breach of contract by the surface owners, authorizing them to force those with an interest in the minerals to again pay consideration for the right to use the surface, or to even completely prevent them from using the surface to extract certain oil or gas, despite their vested right to do so.

---

[13] *See, e.g., United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977); *El Paso* v. *Simmons*, 379 U.S. 497 (1965); *Home Building & Loan Assoc.* v. *Blaisdell*, 290 U.S. 398 (1934); *Edgar A. Levy Leasing Company* v. *Siegel*, 258 U.S. 242 (1922); *Manigault* v. *Springs*, 199 U.S. 473 (1905).

[14] *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 242 (1978) (emphasis in original).

It is equally clear that the statutory provision is not reasonable and necessary to serve an important public purpose. Rather, it delegates to a private individual, a privy of a party to the contract which severed the interest in oil and gas, a veto over the ability of the other party to the contract to have the benefit of his bargain through the fair and necessary use of the surface to reach his property.[15]

Taking of Property

The Fourteenth Amendment to the United States Constitution prohibits a state from making or enforcing any law which deprives a person of property without due process of law.[16] Interpreting that amendment, this Court has consistently held that while a state can exercise its police power to regulate the use of property to protect the public health, safety or general welfare, even though such regulation has the effect of diminishing the value of the property regulated,[17] when the diminution in value "reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."[18] As was recognized by this Court in its recent decision in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), one of the primary factors to be considered in such cases is "[t]he economic impact of the regulation . . . and, par-

---

[15] *See, Department for Natural Resources and Environmental Protection* v. *No. 8 Limited of Virginia*, 528 S.W.2d 684 (Ky. 1975).

[16] The Fourteenth Amendment has been held to incorporate and make applicable to the states the provision of the Fifth Amendment to the United States Constitution that private property shall not "be taken for public use, without just compensation." *See, Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 122 (1978).

[17] *See, e.g., Penn Central Transportation Co.* v. *City of New York*, *supra* note 16; *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349 (1908).

[18] *Pennsylvania Coal Company* v. *Mahon*, *supra* note 10, 260 U.S. at 413.

ticularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . ."

Enforcement of the statute and regulation here in question without doubt diminishes the value of Petitioners' property interests and interferes with investment-backed expectations. In contrast to the regulatory scheme considered by this Court last term in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*, ____U.S. ____ (1981), the statute here in question, by giving the surface owner an absolute veto over the ability of an operator to obtain a deep well permit, does not merely regulate conditions under which the property may be mined, but rather effectively denies the mineral owner or his lessee of the economically viable use of his property,[19] i.e. the oil or gas to be found "in a formation at or below the top of the uppermost member of the 'Onondaga Group' or at a depth of or greater than 6,000 feet, whichever is shallower."[20] In *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393, 414 (1922), Justice Holmes noted:

> "[w]hat makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

The same is equally true for oil and gas.

Moreover, as previously noted, West Virginia Code § 22-4A-7(b)(4) is not designed to serve any public purpose, but rather merely allows the surface owner, at his whim, to deprive the holder of the mineral interests of his

---

[19] *In Hodel* v. *Virginia Surface Mining and Reclamation Assoc., Inc.*, ____ U.S. ____, ____ (1981), this Court, quoting its earlier decision in *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980), specifically noted that "[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land. . . .'"

[20] West Virginia Code § 22-4A-2(a)(13) defining a "deep well". *See*, note 5, *supra*.

vested property rights. At the very least, before a "consent" statute passes constitutional muster, it should afford persons with an interest in the minerals an opportunity for a hearing at which they might establish that consent to use of the surface for oil and gas purposes has already been obtained from the surface owner or his predecessor in title and that the surface owner or his predecessor in title has already been compensated for such use.[21]

Decisions by Other State Courts of Last Resort

A significant state court decision in conflict with the decision in the instant case is *Department for Natural Resources and Environmental Protection* v. *No.* 8 *Limited of Virginia*, 528 S.W.2d 684 (Ky. 1975). There the Court of Appeals of Kentucky struck down as unconstitutional a statute requiring that applications for surface mining permits be accompanied by a statement of consent signed by each holder of a free-hold interest in the land. In so ruling, that state court noted as follows:

> ". . . the police power may be used so as to invade private rights only if the legislation bears a real and substantial relation to the public health, safety, morality or some other phase of the general welfare . . . Here the legislation is ineffective as an environmental conservation measure. It does no

[21] For example, Wyo. Stat. Ann. § 35-11-406(b) (xii) (Supp. 1981) requires the consent of surface owners to mining and reclamation plans for solid minerals. It specifically provides, however, that if such consent cannot be obtained, the applicant for a permit may request a hearing and if the agency finds that the plan was specifically detailed as to proposed surface use, that use will not substantially prohibit operations by the surface owner, that the plan reclaims the surface as soon as feasibly possible, and that the applicant has the legal authority to extract the mineral by surface mining methods, if such methods are contemplated, the permit shall issue without the surface owner's consent. Such a statutory scheme protects the right of both the surface owner and the party with a right to the mineral interests.

> more than delegate to an individual, a privy of a party to the contract which severed the minerals, a veto over the use of land by the other party to the contract. It puts the surface owner in a position to be paid again for what he or his predecessor in title has already received compensation . . . Subsection 8 delegates to countless private individuals who own interests in surface estates from which the mineral has been severed the right to undo whatever environmental conservation purpose the legislation may have by granting their consent, for consideration, to surface mining on their land. It is beyond cavil that the primary purpose in effect of Subsection 8 is to change the relative legal rights and economic bargaining positions of many private parties under the contracts rather than achieve any public purpose. It is, therefore, axiomatic that Subsection 8 is unconstitutional."

The interpretations of federal constitutional law by the Kentucky court in *No. 8 Limited* and by the West Virginia court in the instant case cannot be reconciled and should, accordingly, be resolved by this Court.[22]

A second important state court decision involving divestment of private interests in minerals is *Short* v. *Texaco, Inc.*, 406 N.E.2d 625 (Ind. 1980), juris. noted, *Texaco, Inc.* v. *Short*, ... U.S..... (1981), No. 80-965, argued October 6, 1981. In that case, the constitutionality of the Indiana Mineral Lapse Act, which terminated mineral interests dormant for twenty years by returning severed

---

[22]In *Doochin* v. *Rackley*, 610 S.W.2d 715 (Tenn. 1981), the Supreme Court of Tennessee upheld a state statute requiring the specific consent of the surface owner prior to the issuance of a permit to strip mine when the surface and mineral estates have been severed. However, in that case, the Tennessee court specifically found that the right to use the surface for strip mining was not embraced within the terms of the contract severing the mineral and surface estates since strip mining was unknown in that locale at the time of the severance. There has been no similar finding in this case. Moreover, use of the surface to drill a well for oil or gas is not comparable to "use" of the surface to strip mine.

mineral estates to surface right owners, was at issue. The trial court struck down the Act concluding that the extinguishment of mineral interests thereunder constituted the taking of property without due process of law. The Supreme Court of Indiana reversed. While recognizing that estates in oil, gas, coal and other minerals are vested property interests entitled "to the firmest protection of the Constitution from irrational state action,"[23] that high court nevertheless sanctioned the transfer of private property interests. This Court in agreeing to review the case was apparently concerned with whether or not public interest justified state interference with and alteration of private proprety rights, particularly in the absence of any provisions for an adjudicatory process by a court or administrative agency.

Although the Indiana Mineral Lapse Act and West Virginia Code §22-4A-7(b)(4) are different in content, they both have the effect of returning to surface owners rights which they or their predecessors in title had given up, for lawful consideration, without affording to the parties with vested rights in the minerals due process of law, including both an opportunity to be heard and compensation for a taking of property. Accordingly, the reasons which mandated the granting of writ of certiorari in *Texaco, Inc.* v. *Short*, are equally applicable to the instant case.

Conclusion

In these energy conscious times, state legislatures and courts are in need of guidance from this Court as to the proper constitutional balance between the police powers of the states and the rights of those with interests in mineral estates. The Court considered one aspect of the

[23] *Short* v. *Texaco, Inc.*, 406 N.E.2d 625, 627 (Ind. 1980).

problem last term in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.* It has also agreed to consider the constitutionality of a mineral lapse act in *Texaco, Inc.* v. *Short*. There is as great a need for determination at the highest level of the constitutionality of "surface owners' consent" statutes. In the instant case, West Virginia's high court upheld a consent statute governing the oil and gas field; in contrast, Kentucky's court of last resort ruled that a parallel statute regulating surface mining permits was unconstitutional;[24] the Tennessee Supreme Court sustained similar, but distinguishable, legislation, also in the coal area;[25] other states have apparently not yet ruled on the constitutionality of analogous regulations.[26]

The conflicts must be resolved and appropriate standards set. The statute and regulation complained of here are particularly ripe for such review in that they do not serve or purport to serve any public purpose, but rather have the effect of taking ownership of private property from one private party and vesting that ownership in another private party without due process and without compensation.

---

[24]*Department for Natural Resources and Environmental Protection* v. *No. 8 Limited of Virginia*, *supra* note 15 and discussion in text at note 22, *supra*.

[25]*Doochin* v. *Rackley*, *supra* note 22, and discussion in that note.

[26]*See, e.g.*, Mont. Code Ann. § 82-4-224 (1981); Wyo. Stat. Ann. § 35-11-406(b)(xii) (Supp. 1981) (discussed in note 21, *supra*).

CONCLUSION

For the above stated reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari.

Respectfully submitted,

DEVON CORPORATION
EASON OIL CORPORATION
P & O OIL COMPANY

By Counsel

Paul N. Bowles
Phyllis M. Potterfield
BOWLES, McDAVID, GRAFF & LOVE
1200 Commerce Square
P. O. Box 1386
Charleston, West Virginia 25325

APPENDIX A

OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DELIVERED JULY 9, 1981

FILED
JULY 9, 1981
/s/GEORGE W. SINGLETON
CLERK OF THE SUPREME
COURT OF APPEALS OF
WEST VIRGINIA

NO. 14488

DEVON CORPORATION, EASON OIL COMPANY AND P & O OIL CORPORATION

v.

WALTER N. MILLER, DIRECTOR, WEST VIRGINIA DEPARTMENT OF MINES, ROBERT L. DODD, DEPUTY DIRECTOR, WEST VIRGINIA DEPARTMENT OF MINES, OIL AND GAS DIVISION, AND THOMAS E. HUZZEY, COMMISSIONER, WEST VIRGINIA OIL AND GAS CONSERVATION COMMISSION

Kanawha County — Affirmed

McHugh, Justice

1. The clauses of the Constitution of the United States and the Constitution of West Virginia which forbid the passage of a law impairing the obligation of a contract are not applicable to a statute enacted prior to the making of a contract. Specifically, an oil and gas lease obtained subsequent to the enactment of *W. Va. Code*, 22-4A-7(b)(4), which statute requires an operator to

obtain the written consent and easement of surface owners prior to the drilling or operation of a deep well, is not unconstitutionally impaired by such statute. *U. S. Const.*, art. I, § 10; *W. Va. Const.*, art. III, § 4; *W. Va. Code*, 22-4A-7(b)(4).

2. "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application." Syl. pt. 6, *Lester* v. *State Workmen's Compensation Commissioner*, 242 S.E.2d 443 (W. Va. 1978); Syl. pt. 3, *Sizemore* v. *State Workmen's Compensation Commissioner*, 219 S.E.2d 912 (W. Va. 1975).

McHugh, Justice:

This action is before this Court upon the petition of Devon Corporation, Eason Oil Company and P & O Oil Company (hereinafter "petitioners") for an appeal and supersedeas from a final order of the Circuit Court of Kanawha County, West Virginia, upon all stipulations, exhibits and other matters of record, upon the briefs and argument of counsel and upon the brief of amici curiae.

The petitioners seek review of a final order entered January 16, 1979, of the Circuit Court of Kanawha County by which the petitioners' application for a writ of mandamus was denied. This order further made a part of the record the December 21, 1978, letter memorandum of opinion of the circuit court.

The petitioners are foreign corporations licensed to do business in West Virginia. They are engaged in the exploration, production and sale of oil and natural gas.

During the period in question, the petitioners obtained a leasehold interest in a certain 96 acre tract of land located in Jackson County, West Virginia. On August 21, 1978, the petitioners, through Devon Corporation, applied to the Oil and Gas Conservation Commission of the West Virginia Department of Mines for a permit to drill a "deep well" upon the 96 acre tract.[1] However, by letters dated August 21, 1978, and September 1, 1978, the Commission denied the petitioners' permit application. The basis of this denial was the failure by the petitioners to obtain a written consent and easement for the drilling of a deep well from the surface owners of the tract as required by *W. Va. Code*, 22-4A-7(b)(4) and Rule 3.04 of the Operational Rules of the West Virginia Oil and Gas Conservation Commission.

Consequently, on September 15, 1978, the petitioners filed in the Circuit Court of Kanawha County a petition for a writ of mandamus seeking to compel the respondents to grant the necessary permit to drill a deep well upon the 96 acre tract.

As indicated above, it is from the final order of the circuit court denying relief to the petitioners that the petitioners appeal to this Court.

In its final order, the Circuit Court of Kanawha County set forth the following findings of fact:

> 1. The petitioners are corporations engaged in the exploration for, production and sale of oil and natural gas within the State of West Virginia.
>
> 2. Respondents are responsible for the administration and enforcement of the provisions of Sec-

---

[1] *W. Va. Code*, 22-4A-2(a)(13) provides that a deep well ". . . means any well drilled and completed in a formation at or below the top of the uppermost member of the 'Onondaga Group' or at a depth of or greater than six thousand feet, whichever is shallower."

tion 7, Article 4A, Chapter 22, of the Code of West Virginia, as amended.

3. Under date of October 9, 1968, Lottie Barnette, then the owner of the surface and an undivided one-half interest in the oil and gas of a 96-acre tract of land in Ripley District, Jackson County, West Virginia, executed an oil and gas lease covering her interest in said land to Commonwealth Gas Corporation. Petitioners are successsors in title of Commonwealth Gas Corporation in said lease by assignment made by Commonwealth Gas Corporation in June, 1973.

4. Under date of August 2, 1978, Belle Friese, widow, and Betty L. Nuzum and Stanley W. Nuzum, her husband, then the owners of an undivided interest in the oil and gas in and under the same tract of 96 acres, leased their interests to Petitioners for oil and gas purposes.

5. Under date of August 2, 1978, Doris B. Elicker and Peter Elicker, her husband, then the owners of an undivided interest in the oil and gas in and under the same tract of 96 acres, leased their interest to Petitioners for oil and gas purposes.

6. The oil and gas interests leased to Petitioners by the two separate leases dated August 2, 1978, as aforesaid, were oil and gas interests that had been severed from the ownership of the surface by deed from John Kay and Edna G. Kay his wife, dated August 23, 1924, of record in Jackson County, West Virginia, in Deed Book 102, page 173.

7. On August 21, 1978, Petitioners were the owners of the leasehold estates and rights created and existing by virtue of the three oil and gas leases designated above.

8. On August 21, 1978, Petitioners filed with the Oil and Gas Division of the West Virginia De-

partment of Mines their application for a permit to drill an oil and gas well on the 96-acre tract of land covered by the aforesaid leases. The application was to drill a "deep well" as such is defined in Code 22-4A-2(a)(13). The application as filed was complete in all respects except it did not have accompanying it the written consent and easement executed and acknowledged by the then owners of the surface of said 96-acre tract, which such written consent and easement is required by Respondents under the provisions of West Virginia Code 22-4A-7(b)(4) and Rule 3.04 of the Operational Rules of the Oil and Gas Conservation Commission. At the time Petitioners filed their application for a drilling permit there were not then pending any applications or proceedings to have drilling units established pursuant to the provisions of Article 4A, Chapter 22, of the Code.

9. Respondents refused to grant or issue to Petitioners a drilling permit as applied for and Respondents' sole reason for refusing to issue the permit was Petitioners' failure to accompany their application with the written consent and easement executed and acknowledged by the then owners of the surface of said 96-acre tract of land.

As their petition filed in this Court states, the petitioners do not dispute the above findings of fact of the circuit court.

W. Va. Code, 22-4A-7(b)(4) provides as follows:

No drilling or operation of a deep well for the production of oil or gas shall be permitted upon or within any tract of land unless the operator shall have first obtained the written consent and easement therefor, duly acknowledged and place [sic] of record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe

> with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy which consent and easement shall be submitted by the operator to the commission.

Furthermore, Rule 3.04 of the Operational Rules of the West Virginia Oil and Gas Conservation Commission provides in part as follows: "All applications submitted to deputy director for oil and gas for a permit to drill * * * any deep well * * * shall be reviewed by the commission [of the oil and gas conservation commission] or by an authorized agent to ascertain compliance with these rules and regulations."

The Circuit Court of Kanawha County concluded that, without the written consent for the drilling of a well from the surface owners, the petitioners had not complied with the provisions of *W. Va. Code*, 22-4A-7(b)(4), and were thus not entitled to the permit. Specifically, the circuit court noted that *W. Va. Code*, 22-4A-7(b)(4) was enacted in 1972 and therefore, the statute was effective prior to the time in 1978 when the petitioners acquired the remaining undivided one-half interest in the oil and gas underlying the 96-acre tract. It was upon this basis that the circuit court held that the petitioners were subject to the surface owners consent requirement.[2]

---

[2]In its December 21, 1978, letter memorandum of opinion, the circuit court stated in part as follows:

> From the facts, which are stipulated, petitioners do not have the written consent as aforesaid. By various agreements and assignments they possess a lease hold interest in one-half the oil and gas in certain land in Jackson County, West Virginia. . . . The estate they possess was created and, therefore, existed before the effective date of the statute they challenge. They acquired the remaining one-half interest in the oil and gas to said land by a lease from the owners thereof after the effective date of the statute. . . . In *Paxton* v. *Benedum-Trees Oil Co.*, 80 W. Va. 87, [sic] 94 S.E. 472 (1917), it was held that the owner of an undivided one-half interest in oil and gas cannot grant a valid lease in all of the oil and gas. A lease made after the enactment of a statute is not impaired by the statute. *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 66 L. Ed. 595 (1921).

In their petition filed in this Court, the petitioners assert that the requirements imposed by *W. Va. Code*, 22-4A-7(b)(4) and Rule 3.04 of the Operational Rules of the Oil and Gas Conservation Commission violate the United States and West Virginia Constitutions. Specifically, the petitioners assert that the statutory consent and easement to be acquired from the surface owners prior to drilling a deep well (1) impairs the obligation of a contract existing prior to the 1972 enactment of *W. Va. Code*, 22-4A-7, and (2) constitutes a taking of the property of the petitioners without due process of law.[3] Furthermore, the petitioners contend that the requirements of *W. Va. Code*, 22-4A-7(b)(4) and Rule 3.04, if constitutional, do not apply in this particular case.

The circuit court in its decision relied upon *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 42 S.Ct. 289, 66 L.Ed. 595 (1922), in which the Supreme Court of the United States upheld the constitutionality of certain emergency housing statutes of the State of New York. These statutes limited the power of landlords with respect to the eviction of tenants and the amount charged for rent. The Court concluded that under existing housing conditions the statutes were a reasonable exercise of the police power of the government. In its decision, the Court in *Levy Leasing Co.*, noted that ". . . a lease made subsequent to

---

[3] *U. S. Const.*, art. I, § 10, provides in part as follows: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

W. Va. Const., art III, § 4, provides in part as follows: "No bill of attainder, ex post facto law, or law impairing the obligation of a contract, shall be passed."

U. S. Const., amend XIV, provides in part as follows: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

W. Va. Const, art III, § 10, provides as follows: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." *See, also, W. Va. Const.*, art. 3, § 1.

the enactment of a statute can not be impaired by it." 258 U. S. at 249.

The Supreme Court of the United States in *Levy Leasing Co.* cited the case of *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, 23 S.Ct. 234, 47 L.Ed. 249 (1903), in which the Court held in Syl. pt. 2, in part, that "[t]he contract clause of the Constitution of the United States has reference only to a statute of a State enacted *after* the making of the contract whose obligation is alleged to have been impaired."[4]

The *Levy Leasing Co.* case is consistent with the general rule that the obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and the performance of the contract is to be regulated by the terms and rules which such laws prescribe.[5]

This Court concludes contrary to the assertion of the petitioners, that the petitioners did not acquire the drilling rights in question in the 96 acre tract until 1978, subsequent to the effective date of *W. Va. Code*, 22-4A-7. Specifically, this Court has carefully reviewed the title as reflected in the record to the oil and gas rights underlying the 96-acre tract and is of the opinion that the Circuit Court of Kanawha County was correct in concluding that

---

[4]This Court cited *Levy Leasing Co., supra*, in *State* v. *Flinn*, 208 S.E.2d 538, 544 (W. Va. 1974) and *Brown* v. *Arnold*, 125 W. Va. 824, 833, 26 S.E.2d 238, 242 (1943).

[5]*W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60, 55 S.Ct. 555, 556, 79 L.Ed. 1298, 1301 (1935); *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 429, 54 S.Ct. 231, 78 L.Ed. 413, 424 (1934); *Hendrickson* v. *Apperson*, 245 U. S. 105, 112, 38 S.Ct. 44, 45, 62 L.Ed. 178, 184 (1917); *Northwestern Mutual Life Insurance Co.* v. *McCue*, 223 U. S. 234, 246, 32 S.Ct. 220, 222, 56 L.Ed. 419, 423 (1912); *Trader* v. *Jester*, 40 Del. 66, 76, 1 A.2d 609, 613 (1938); *Morris* v. *Interstate Bond Co.*, 180 Ga. 689, 692, 180 S.E. 819, 821 (1935); *Hubbard* v. *Hubbard*, 264 S.W. 422, 423 (Mo. App. 1924); *Gagnon* v. *Butte*, 75 Mont. 279, 289, 243 P. 1085, 1088 (1926); *Clark* v. *Philadelphia*, 328 Pa. 521, 528, 196 A. 384, 387 (1938); *Bettman* v. *Cowley*, 19 Wash. 207, 214, 53 P. 53, 56 (1898).

the petitioners acquired a one-half interest in the oil and gas prior to the enactment of *W. Va. Code*, 22-4A-7, and the remaining one half oil and gas interest subsequent to the enactment of *W. Va. Code*, 22-4A-7.[4]

In *Freeman* v. *Egnor*, 72 W. Va. 830, 834, 79 S.E. 824, 326 (1913), this Court stated that all cotenants must join in agreement before a lessee may enter upon and operate the premises for the production of oil and gas. Specifically, as this Court stated:

> The leases should not have been cancelled upon the state of the pleadings. But are they void or voidable, solely because executed by some co-tenants on their undivided interests in lands held in common with others not joining therein? We do not think they are. Of course, to be effectual in

---

[4]Lottie Barnette on October 9, 1968, leased to Commonwealth Gas Corporation her interest in the surface and an undivided one-half interest in the oil and gas of the 96 acre tract in Jackson County, West Virginia. This lease from Lottie Barnette to Commonwealth was a 10 year lease. As the learned trial judge indicated in his findings of fact, the petitioners were, by assignment, successors in title of Commonwealth in such lease.

The remaining one-half interest in the oil and gas of the 96 acre tract has a separate history. This one-half interest was first obtained by J. A. Friese from John and Edna Kay by deed dated August 23, 1924. J. A. Friese and Belle Friese, his wife, by agreement dated June 26, 1963, leased this one-half interest to the Union Carbide Corporation. Five years later, J. A. and Belle Friese, by agreement dated July 30, 1968, leased the one-half interest to the Commonwealth Gas Corporation. J. A. and Belle Friese, by agreement dated July 30, 1973, again leased the one-half interest to the Commonwealth Gas Corporation. These leases by J. A. and Belle Friese in 1963, 1968 and 1973 were essentially five year leases. As the July 30, 1973, lease to Commonwealth states: "It is agreed that this lease shall remain in force for the term of five years from this date and as long thereafter as the Lessee is engaged in the production of or search for oil and gas, or either of them, on the leased premises."

Before the Circuit Court of Kanawha County, the parties stipulated "[t]hat in June of 1973 Devon Corporation and its successors acquired from Commonwealth Gas Corporation by various agreements and assignments the working interest in the 96-acre Barnette-Friese Tract." However, with respect to the one-half interest in oil and gas underlying the 96 acre tract derived from J. A. Friese, the record indicates that the interest of the petitioners must have terminated in 1978 (approximately five years subsequent to the 1973 lease) inasmuch as on August 2, 1978, the petitioners again acquired a lease of the one-half interest from the devisees of J. A. Friese.

the sense that the lessee may enter on and operate the premises for the production of oil and gas, all the co-tenants must join. A lease by one only does not warrant such entry and production. Those not joining may restrain the lessee from entering for the purpose of operating thereunder without their consent. Numerous cases so hold. One co-tenant can not authorize another to do what he himself can not do; but he may authorize him to do, under any lease or other contract, what he may legally do in his own behalf. *Trees* v. *Eclipse Oil Co.*, 47 W. Va. 107. Notwithstanding the co-tenancy, each tenant has the same interest and property rights in common as his associates have, and may therefore lawfully grant, lease and otherwise encumber his individual interests. 'An oil and gas lease executed by one or more joint tenants or tenants in common, while not binding on other join [sic] tenants or tenants in common, is good between the parties, and is binding on their interests." This terse statement comprehends the law on this subject, and is approved and sustained, directly or indirectly, by the following cases: *Trees* v. *Eclipse Oil Co., supra*; *Headley* v. *Hoopengarner*, 60 W. Va. 626; *Pyle* v. *Henderson*, 65 W. Va. 39; *McNeeley* v. *South Penn Oil Co.*, 58 W. Va. 438; *Stewart* v. *Tennant*, 52 W. Va. 559; *Sommers* v. *Bennett*, 68 W. Va. 157; *Garrett* v. *South Penn Oil Co.*, 66 W. Va. 587; *Ziegler* v. *Brenneman*, 237 Ill. 15; *Compton* v. *Peoples Gas Co.*, 75 Kan. 572, 10 L.R.A.N.S. 787.

72 W. Va. at 834.'

'Donley, *The Law of Coal, Oil and Gas in West Virginia and Virginia* § 48 (Michie, 1951) states as follows:

> While a cotenant may not lease for oil and gas purposes the interests of his cotenants, he may lease his own interest. If a cotenant takes exclusive possession of the land and leases it for oil purposes on a royalty basis the excluded cotenant may permit the lessee to continue operations and require an accounting of his proportionate share of the royalties. And, a cotenant of coal lands is not bound by a lease made by the other cotenants, which he

(Footnote continued on next page)

Although the petitioners may have acquired rights in the surface to the 96 acre tract prior to the enactment of *W. Va. Code*, 22-4A-7(b)(4), the language of this section is specifically directed to drilling in that this section provides that without the written consent and easement of the surface owners "no drilling or operation of a deep well for the production of oil and gas shall be permitted." The petitioners do not argue that their surface rights acquired from Lottie Barnette through the Commonwealth Gas Corporation are equivalent to the consent requirements of *W. Va. Code*, 22-4A-7(b)(4). Nor did the petitioners acquire full rights in the oil and gas interests underlying the 96 acre tract until after the enactment of *W. Va. Code*, 22-4A-7(b)(4).

This Court in Syl. pt. 3, *Sizemore* v. *State Workmen's Compensation Commissioner*, 219 S.E.2d 912 (W. Va. 1975), and Syl. pt. 6, *Lester* v. *State Workmen's Compensation Commissioner*, 242 S.E.2d 443 (W. Va. 1978), held as follows:

> A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application.

Upon the facts presented to us, this Court concludes that *W. Va. Code*, 22-4A-7(b)(4), and Rule 3.04 of the

---

(Footnote continued)

did not sign, where reduction to writing and signature was a condition precedent to the existence of such lease.

For this proposition Professor Donley cites the following cases: *Blair* v. *Dickinson*, 133 W. Va. 38, 54 S.E.2d 828 (1949); *Paxton* v. *Benedum-Trees Oil Co.*, 80 W. Va. 187, 94 S.E. 472 (1917); and *Freeman* v. *Egnor*, *supra*.

Operational Rules of the West Virginia Oil and Gas Conservation Commission do not unconstitutionally impair the obligation of contract or constitute the taking of the petitioners' property without due process of law. Nor can this Court say that the surface owners' consent requirement does not apply in this case.

The language of *W. Va. Code*, 22-4A-7(b)(4), is clear that "all owners of the surface" must consent in writing to the drilling or operation of a deep well for the production of oil or gas. This Court is of the opinion that "owners of the surface" means that a prospective driller, to satisfy the requirements of *W. Va. Code*, 22-4A-7(b)(4), must obtain the written consent and easement of all those who were surface owners at the time application to drill a deep well is made to the Oil and Gas Conservation Commission of the West Virginia Department of Mines and if such surface owners subsequently convey their surface interest to another prior to the time the actual drilling or operation of a deep well is commenced, no further written consent and easement pursuant to *W. Va. Code*, 22-4A-7(b)(4) shall be required.

For these reasons the final order of the Circuit Court of Kanawha County is affirmed.

Affirmed.

APPENDIX B

ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA ENTERED JANUARY 16, 1979

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

DEVON CORPORATION, a corporation,
EASON OIL COMPANY, a corporation,
and P & O OIL CORPORATION, a
corporation,

Petitioners

v.

CIVIL ACTION NO. MISC. 78-410
In Mandamus
(Judge Smith)

WALTER N. MILLER, Director, West
Virginia Department of Mines,
ROBERT L. DODD, Deputy Director,
West Virginia Department of Mines,
Oil and Gas Division, and
THOMAS E. HUZZEY, Commissioner,
West Virginia Oil and Gas Conservation Commission,

Respondents

ORDER

This cause came on to be heard and decided upon the petition, with exhibits, filed herein by Petitioners the answer filed herein by Respondents, stipulations of facts filed herein and made a part of the record, and upon

argument of counsel. Upon consideration of all of the foregoing the Court does hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Petitioners are corporations engaged in the exploration for, production and sale of oil and natural gas within the State of West Virginia.

2. Respondents are responsible for the administration and enforcement of the provisions of Section 7, Article 4A, Chapter 22, of the Code of West Virginia, as amended.

3. Under date of October 9, 1968, Lottie Barnette, then the owner of the surface and an undivided one-half interest in the oil and gas of a 96-acre tract of land in Ripley District, Jackson County, West Virginia, executed an oil and gas lease covering her interest in said land to Commonwealth Gas Corporation. Petitioners are successors in title of Commonwealth Gas Corporation in said lease by assignment made by Commonwealth Gas Corporation in June, 1973.

4. Under date of August 2, 1978, Belle Friese, widow, and Betty L. Nuzum and Stanley W. Nuzum, her husband, then the owners of an undivided interest in the oil and gas in and under the same tract of 96 acres, leased their interests to Petitioners for oil and gas purposes.

5. Under date of August 2, 1978, Doris B. Elicker and Peter Elicker, her husband, then the owners of an undivided interest in the oil and gas in and under the same tract of 96 acres, leased their interest to Petitioners for oil and gas purposes.

6. The oil and gas interests leased to Petitioners by the two separate leases dated August 2, 1978, as aforesaid,

were oil and gas interests that had been severed from the ownership of the surface by deed from John Kay and Edna G. Kay, his wife, dated August 23, 1924, of record in Jackson County, West Virginia, in Deed Book 102, page 173.

7. On August 21, 1978, Petitioners were the owners of the leasehold estates and rights created and existing by virtue of the three oil and gas leases designated above.

8. On August 21, 1978, Petitioners filed with the Oil and Gas Division of the West Virginia Department of Mines their application for a permit to drill an oil and gas well on the 96-acre tract of land covered by the aforesaid leases. The application was to drill a "deep well" as such is defined in Code 22-4A-2(a)(13). The application as filed was complete in all respects except it did not have accompanying it the written consent and easement executed and acknowledged by the then owners of the surface of said 96-acre tract, which such written consent and easement is required by Respondents under the provisions of West Virginia Code 22-4A-7(b)(4) and Rule 3.04 of the Operational Rules of the Oil and Gas Conservation Commission. At the time Petitioners filed their application for a drilling permit there were not then pending any applications or proceedings to have drilling units established pursuant to the provisions of Article 4A, Chapter 22, of the Code.

9. Respondents refused to grant or issue to Petitioners a drilling permit as applied for and Respondents' sole reason for refusing to issue the permit was Petitioners' failure to accompany their application with the written consent and easement executed and acknowledged by the then owners of the surface of said 96-acre tract of land.

CONCLUSIONS OF LAW

1. Neither the requirements of Code 22-4A-7(b)(4) nor of Rule 3.04 are in violation of the Federal or State constitutions and are valid and enforceable under the facts of this case, as more fully discussed and set out in the written letter opinion of the Court dated December 21, 1978, a copy of which said letter opinion is annexed hereto and made a part hereof.

2. Petitioners are not entitled to a writ of mandamus for the reasons set out in the Court's letter opinion dated December 21, 1978.

ORDER

It is accordingly ORDERED that the writ of mandamus applied for by Petitioners be and the same is hereby denied and the Rule heretofore awarded is discharged.

Whereupon Petitioners, by counsel, moved the Court to set aside its order and decision and grant to them a new hearing and to reconsider the matters in issue, which said motion is hereby denied.

DATE: January 16, 1979.

ENTER:

/s/ROBERT K. SMITH
Judge

INSPECTED BY:

/s/PAUL N. BOWLES
Counsel for Petitioners
/s/RICKLIN BROWN
Counsel for Petitioners
/s/RICHARD L. EARLES
Counsel for Respondents

STATE OF WEST VIRGINIA
THIRTEENTH JUDICIAL CIRCUIT
KANAWHA COUNTY COURTHOUSE
CHARLESTON, WEST VIRGINIA 25301

ROBERT K. SMITH
Judge

December 21, 1978

Mr. Paul N. Bowles, Esquire
1200 Commerce Square
Charleston, West Virginia 25325

Mr. Richard L. Earles, Esquire
Assistant Attorney General
State Capitol
Charleston, West Virginia 25305

Re: Devon Corporation, etal

v.

Walter N. Miller, Director
W. V. Department of Mines,
etc.
Civil Action No. Misc. 78-410

Gentlemen:

Petitioners challenge Code 22-4A-7(b)4 which in substance requires the written consent of all surface owners acknowledged and recorded in the office of the County Clerk where the land is located before they may be permitted to drill a "deep well" as defined in Code 22-4A-2 (a)(13) contending that the statute is unconstitutional because it impairs the right of contract of both the State and Federal Constitution.

From the facts, which are stipulated, petitioners do not have the written consent as aforesaid. By various agree-

ments and assignments they possess a lease hold interest in one-half the oil and gas in certain land in Jackson County, West Virginia. (see Exhibit A attached to complaint). The estate they possess was created and, therefore, existed before the effective date of the statute they challenge. They acquired the remaining one-half interest in the oil and gas to said land by a lease from the owners thereof after the effective date of the statute. (see Exhibits B & C attached to the complaint). In *Paxton* v. *Benedum-Trees Oil Co.*, 80 W. Va. 87, 94 S.E. 472 (1917), it was held that the owner of an undivided one-half interest in oil and gas cannot grant a valid lease in all of the oil and gas. A lease made after the enactment of a statute is not impaired by the statute. *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242, 66 L.Ed. 595 (1921).

The leases described in Exhibit B & C as aforesaid were taken from *owners* not lessees, hence such leases could not be assignments of leases existing or sub-leases of leases existing before the effective date of the statute. The vital point is that a new estate was created after the effective date of the statute since the plaintifis were dealing with owners rather than lessees, making it impossible to have an assignment.

Inasmuch, as the impairment of contract clause as asserted applies only to legislation subsequent in time to the contract (lease in this matter) alleged to have been impaired, I am of the opinion that the statute is not unconstitutional in its application, at least in this situation. The petitioners having failed to show a clear legal right to the issuance of a writ of mandamus requiring the respondent to grant a drilling permit, the writ applied for is denied and the Rule heretofore awarded is discharged.

An order in conformity herewith should be promptly tendered for entry. Such order should make this letter memorandum of opinion a part thereof. A copy for that purpose is enclosed herewith.

Very truly yours,

/s/ROBERT K. SMITH

APPENDIX C

NOTICE BY STATE OF WEST VIRGINIA OIL AND GAS CONSERVATION COMMISSION TO DEVON CORPORATION THAT PERMIT TO DRILL DEEP WELL HAD BEEN DENIED

STATE OF WEST VIRGINIA
OIL AND GAS CONSERVATION COMMISSION
CHARLESTON 25305

THOMAS E. HUZZEY
Commissioner
OGC-876

September 1, 1978

Mr. Bill Backus
Devon Corporation
P. O. Box 1433
Charleston, WV 25325

Re: Application to Drill a Deep Well on the
Lottie Barnett et al Farm

Dear Sir:

Your application to drill a deep well on the Lottie Barnett et al Farm in Ripley District, Jackson County, has been denied.

As was indicated on the letter attached, dated August 21, 1978, to Mr. Robert L. Dodd, the application was denied because you have not met the requirements of Rule 3.04, paragraph (a), related to the "Consent and Easement," and that section of the statute §22-4A-7-(b)-(4).

In your application you did meet the requirements of Rule 3.02, i.e., the location was more than four hundred (400) feet for a lease from unit boundary, and more than three thousand (3,000) feet from a deep well drilled to

or capable of producing hydrocarbons from the objective pool.

Very truly yours,

/s/THOMAS E. HUZZEY
Commissioner

STATE OE WEST VIRGINIA
OIL AND GAS CONSERVATION COMMISSION
CHARLESTON 25305

August 21, 1978

THOMAS E. HUZZEY
Commissioner

Mr. Robert L. Dodd
Deputy Director
Department of Mines
Oil and Gas Division

RE: APPLICATION FOR PERMIT #47-035-1461
TO DRILL DEEP WELL
COMPANY: DEVON CORPORATION
FARM: LOTTIE BARNETT HEIRS
COUNTY: JACKSON DISTRICT: RIPLEY

The application of the above company is DISAPPROVED.
(APPROVED-DISAPPROVED)
Applicant HAS NOT complied with the provisions of
(HAS-HAS NOT)
chapter twenty-two, article four-a, (§22-4A), of the code of West Virginia, nineteen hundred and thirty-one (1931), as amended, Oil and Gas Conservation, as follows:

1. *Provided a certified copy of duly acknowledged and recorded consent and easement from all surface owners; NO*

2. *Provided a tabulation of all deep wells within one mile of the proposed location, including the API number of the deep well, well name, and the name and address of the operator, and;* **

3. *Provided a plat showing that the proposed location is a distance of 700 feet from the nearest unit boundary and showing the following wells drilling to or capable of producing from the objective formation within 3,000 feet of the proposed location:*

**

035-1458 - 4000'
035-1038 - 5600'
035-1024 - 2500' - P&A - 11/27/71

Very truly yours,

/s/THOMAS E. HUZZEY
Commissioner

APPENDIX D

ORDER OR DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ENTERED JULY 9, 1981

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 9th day of July, 1981, the following order was made and entered, to-wit:

14488

Devon Corporation, a corporation, Eason Oil Company, a corporation, and P & O Oil Company, a corporation, Petitioners Below, Plaintiffs in Error
vs.

Walter N. Miller, Director, West Virginia Department of Mines, Robert L. Dodd, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and Thomas E. Huzzey, Commissioner, West Virginia Oil and Gas Conservation Commission, Respondents Below, Defendants in Error

Upon a writ of error and supersedas to a judgment of the Circuit Court of Kanawha County rendered on the 16th day of January 1979.

The Court having maturely considered the transcript of the record herein and the argument and briefs of counsel thereon, and the brief Amicus Curiae for Hallie Mae Johnson, Oil and Gas Reform Coalition and Timothy P. Higgins, is of opinion for reasons stated in wriring [sic] and filed with the record that there is no error in said judgment. It is therefore considered and ordered by the Court that the judgment of the Circuit Court of Kanawha

County rendered on the 16th day of January, 1979, be, and the sam [sic] is hereby, affirmed, and that the defendants in error do recover of and from the plaintiffs in error, their costs about their defense in this Court in this behalf expended, and Thirty Dollars damages; all of which is ordered to be certified to the Circuit Court of Kanawha County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice McHugh, was concurred in by Chief Justice Harshbarger, Justices Neely, Miller and McGraw.

APPENDIX E

ORDER OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA DENYING REHEARING ENTERED OCTOBER 8, 1981

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th day of October, 1981, the following order was made and entered, to-wit:

14488

Devon Corporation, a corporation, Eason Oil Company, a corporation, and P & O Oil Company, a corporation, Petitioners Below, Plaintiffs in Error

vs.

Walter N. Miller, Director, West Virginia Department of Mines, Robert L. Dodd, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and Thomas E. Huzzey, Commissioner. West Virginia Oil and Gas Conservation Commission, Respondents Below, Defendants in Error

The Court having maturely considered the petition for rehearing and reargument filed in the captioned action is of opinion to, and doth hereby deny the prayer of the petition and doth order that the final order entered herein be made absolute and certified as heretofore directed. Chief Justice Harshbarger absent.

Opposition

81-1263

Office - Supreme Court, U.S.
FILED
FEB 5 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

DEVON CORPORATION, a corporation,
EASON OIL COMPANY, a corporation,
and P & O OIL CORPORATION, a corporation,

Petitioners,

v.

WALTER N. MILLER, Director, West Virginia Department of Mines,
ROBERT L. DODD, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and
THOMAS E. HUZZEY, Commissioner, West Virginia Oil and Gas Conservation Commission,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

CHAUNCEY H. BROWNING
Attorney General
State of West Virginia
NICHOLAS W. JOHNSON
Deputy Attorney General
Counsel of Record
B. KEITH HUFFMAN
Assistant Attorney General
Counsel for Respondents

OFFICE OF ATTORNEY GENERAL
STATE CAPITOL BUILDING
CHARLESTON, WEST VIRGINIA 25305
(304) 348-0546
February 3, 1982

THE QUALITY PRESS, CHARLESTON, W. VA.

TABLE OF CONTENTS

	Page
RESPONSE TO QUESTIONS PRESENTED	ii
INDEX TO AUTHORITIES	iii
RESPONSE TO PETITION FOR WRIT OF CERTIORARI	1
I. CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4) OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, AND RULE 3.04 OF THE OPERATIONAL RULES OF THE OIL AND GAS CONSERVATION COMMISSION DID NOT UNCONSTITUTIONALLY IMPAIR CONTRACTS ENTERED INTO BY THE PETITIONERS AFTER THE ENACTMENT DATE OF THE STATUTE.	3
II. CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4), OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, AND RULE 3.04 OF THE OPERATIONAL RULES OF THE OIL AND GAS CONSERVATION COMMISSION, REQUIRING THE WRITTEN CONSENT OF THE OWNER(S) OF THE SURFACE FOR THE LOCATION AND DRILLING OF A "DEEP" OIL OR GAS WELL IS VALID UNDER THE CONSTITUTION OF THE UNITED STATES AND DOES NOT AMOUNT TO A TAKING OF VESTED PROPERTY INTERESTS WITHOUT DUE PROCESS OF LAW.	6
III. THIS CASE IS NOT RIPE FOR ADJUDICATION ON THE ISSUES OF WHETHER CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4) OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, CONSTITUTES A "TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW" OR "IMPAIRS CONTRACTS".	11
CONCLUSION	12

RESPONSE TO QUESTIONS PRESENTED

I. CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4) OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, AND RULE 3.04 OF THE OPERATIONAL RULES OF THE OIL AND GAS CONSERVATION COMMISSION DID NOT UNCONSTITUTIONALLY IMPAIR CONTRACTS ENTERED INTO BY THE PETITIONERS AFTER THE ENACTMENT DATE OF THE STATUTE.

II. CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4) OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, AND RULE 3.04 OF THE OPERATIONAL RULES OF THE OIL AND GAS CONSERVATION COMMISSION, REQUIRING THE WRITTEN CONSENT OF THE OWNER(S) OF THE SURFACE FOR THE LOCATION AND DRILLING OF A "DEEP" OIL OR GAS WELL IS VALID UNDER THE CONSTITUTION OF THE UNITED STATES AND DOES NOT AMOUNT TO A TAKING OF VESTED PROPERTY INTERESTS WITHOUT DUE PROCESS OF LAW.

III. THIS CASE IS NOT RIPE FOR ADJUDICATION ON THE ISSUES OF WHETHER CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4), OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, CONSTITUTES A "TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW" OR "IMPAIRS CONTRACTS."

INDEX TO AUTHORITIES

Dept. for Natural Resources and Environmental Protection v. No. 8 Limited of Virginia, 528 S.W.2d 684 (Ky. 1975) ---------- 9

Devon Corp., v. Miller, 280 S.E. 2d 108 (W V.a. 1981) ---- 3

Doochin v. Rackley, 610 S.W.2d 715 (*Tenn.* 1981) -------- 9

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 66 L. Ed. 595 42 S. Ct. 289, (1922) ---------- 4, 7

Freeman v. Egnor, 72 W. Va. 830, 79 S.E. 2d 824 (1913) ---------- 7

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., et al., 49 U.S.L.W. 4654, 4662 (June 15, 1981) ---------- 11

Martin v. Kentucky Oak Mining Co., 429 S.W.2d 395 (Ky. 1968) ---------- 9

McClintic v. Dunbar Land Co., 127 W. Va. 454, 33 S.E.2d ETC (1945) ---------- 7

Paxton v. Benedum-Trees Co., 80 W. Va. 187, 94 S.E. 472 (1917) ---------- 7

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L. Ed.2d 631, 98 S. Ct. 2646 (1978) -- 7, 10

Short v. Texaco, Inc. 406 N.E.2d 625 (*Ind.* 1980) ---------- 5

Texaco, Inc. v. Short, et al., 50 U.S.L.W. 4117 (*January* 12, 1982) ---------- 4, 5

Triegle v. Acme Homestead Association, 297 U.S. 80 L. Ed. 575, 56 S. Ct. 408 (1936) ---------- 5

White v. Bailey, 65 W.Va. 573, 64 S.E. 1019 (1909) -------- 8

Wiser Oil Co. v. Conley, 346 S.W.2d 718 (Ky. 1960) -------- 9

Constitutional Provisions

U.S. Const., Art. 1, § 10 ---------- 2

W. Va. Const., Art. III, § 4 ---------- 2

Statutes

West Virginia Code 22-4A ---------- 7

West Virginia Code 22-4A-7(b)(4) ---------- 1, 2, 4, 5, 6, 7 8, 9, 10, 11,

Administrative Regulations

West Virginia Administrative Regulations, Oil and Gas Conservation Commission, (Chapter 22-4A), Rule 3.04 (1979 Ed.) ---------- 2

Other Authorities

16 Am Jur 2d, *Constitutional Law*, § 689 ---------- 4

Kentucky's Experience with the Broad Form Deed, 63 *Ky. L.J.* 107, 134-135 (1975) ---------- 9

No. _____

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

DEVON CORPORATION, a corporation,
EASON OIL COMPANY, a corporation,
and P & O OIL CORPORATION, a corporation,

Petitioners,

v.

WALTER N. MILLER, Director, West Virginia Department of Mines,

ROBERT L. DODD, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and

THOMAS E. HUZZEY, Commissioner, West Virginia Oil and Gas Conservation Commission,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Now comes the Respondents pursuant to Rule 16 of the Rules of this Court and moves this Court to dismiss the Petition for Writ of Certiorari filed by the Petitioners or to affirm the judgment of the court below for the reasons to be cited herein.

This case is before this Court from an appeal of the decision of the West Virginia Supreme Court of Appeals. That decision and this petition involves the constitutionality of West Virginia Code 22-4A-7(b)(4) as applied to the facts of this case. That statute reads as follows:

> "No drilling or operation of a deep well for the production of oil and gas shall be permitted upon or within any tract of land unless the operator shall have first obtained

the written consent and easement therefor, duly acknowledged and placed of record in the office of the county clerk, for valuable consideration of all owners of the surface of such tract of land, which consent shall describe with reasonable certainty, the location upon such tract, of the location of such proposed deep well, a certified copy which consent and easement shall be submitted by the operator to the commission."

In addition, the Petitioners challenge Rule 3.04 of the Operational Rule of the West Virginia Oil and Gas Conservation Commission which provides in part as follows: "All applications submitted to the deputy director for oil and gas for a permit to drill *** any deep well *** shall be reviewed by the Commissioner [of the oil and gas conservation commission] or by an authorized agent to ascertain compliance with these rules and regulations."

The decision of the West Virginia Supreme Court of Appeals held that West Virginia Code 22-4A-7(b)(4) was not violative of the State or Federal constitutions' prohibitions on the taking of vested contractual obligations or the taking of vested property interests without due process of law. The judgment was entered July 9, 1981 and a petition for rehearing was denied on October 8, 1981.

The Supreme Court of Appeals decision headnoted its opinion as follows:

1. The clauses of the Constitution of the United States and the Constitution of West Virginia which forbid the passage of a law impairing the obligation of a contract are not applicable to a statute enacted prior to the making of a contract. Specifically, an oil and gas lease obtained subsequent to the enactment of W. Va. Code 22-4A-7(b)(4), which statute requires an operator to obtain the written consent and easement of surface owners prior to the drilling or operation of a deep well, is not unconstitutionally impaired by such statute. *U.S. Const.*, art. I, § 10; W. *Va. Const.*, art. III, § 4; W. *Va. Code* 22-4A-7(b)(4).

"(2. A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its

enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application.) Syl. pt. 6, *Lester v. State Workmen's Compensation Commissioner*, 242 S.E. 2d 443 (W. Va. 1978); Syl. pt. 3, *Sizemore v. State Workmen's Compensation Commissioner*, 219 S.E.2d 912 (W. Va. 1975)" *Devon Corp. v. Miller*, 280 S.E. 2d 108 (W. Va. 1981).

I.

CHAPTER 22, ARTICLE 4A, SECTION 7 (b) (4) OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, AND RULE 3.04 OF THE OPERATIONAL RULES OF THE OIL AND GAS CONSERVATION COMMISSION DID NOT UNCONSTITUTIONALLY IMPAIR CONTRACTS ENTERED INTO BY THE PETITIONERS AFTER THE ENACTMENT DATE OF THE STATUTE.

The chronology of facts in the case are of paramount importance in understanding the decisions of the Kanawha County Circuit Court and the West Virginia Supreme Court of Appeals in holding that there was no impairment of contract by the application of Code 22-4A-7(b)(4) to the facts.

In short summary, the facts show as follows:

1) 1924, 96-acre tract of land had mineral title and surface title severed,

2) 1968, successor to surface title and one-half of mineral title leased same one-half undivided mineral estate to Commonwealth Gas Corporation,

3) 1972, West Virginia Code 22-4A-7(b)(4) requiring surface owners' consent before a permit to drill a "deep" well is issued is enacted into law,

4) 1973, Petitioners succeed to the title held by Commonwealth by assignment,

5) 1978, Petitioners lease the other one-half undivided interest in the minerals to the 96-acre tract giving Petitioners a lease of all of said minerals,

6) 1978, Petitioners are denied a permit to drill a deep well by the Respondents because a written consent and easement was not obtained from the surface owners of the 96-acre tract and filed with the application.

Petitioners allege that the acquisition of a one-half interest in the oil and gas underlying the 96-acre tract in 1968 became a contract with the surface owner to remove the undivided one-half interest in the minerals and that the "contract" was impaired by the subsequent enactment of West Virginia Code 22-4A-7(b)(4). As will be discussed hereinafter, this Court has held that this interest amounts not to a contract right but a property right. *Texaco, Inc. v. Short*, 50 U.S.L.W. 4117 (January 12, 1982).

The general rule of law provides that the obligation to contract is measured by the standard of the laws in force at the time it was entered into, 16A Am. Jur. 2d *Constitutional Law* § 689, and the performance of the contract is to be regulated by the terms and rules which such laws prescribe. Consistent with this rule is the case of *Edgar V. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 66 L. Ed. 595, 42 S. Ct. 289, (1922) relied upon heavily by the Kanawha County Circuit Court and the West Virginia Supreme Court of Appeals. In its decision, this Court in *Levy Leasing Co. v. Siegel* noted that "a lease made subsequent to the enactment of a statute cannot be impaired by it." 258 U.S. at 249. This is precisely the factual application in the present case; the "contract" was not made in 1968 with the surface owner by holding title to a one-half undivided interest in the minerals, but the contract was the lease entered into by Petitioners after they acquired the 100 percent interest in the minerals in 1978 and applied for permission to drill a deep well. These oil and gas leases are described in Brief of Plaintiffs in Error in the lower court. It is noteworthy to add that the record shows that Petitioners have extended these leases as a result of the commencement of drilling operations for a "shallow" well upon a drilling unit which incorporates a part of the 96-acre tract.

Petitioners point out in their brief that this Court has long recognized that the constitutional prohibition against impairment of contract is not absolute and they cite *Triegle v. Acme Homestead Association*, 297 U.S. 189, 197 80 L. Ed. 575, 56 S. Ct. 408 (1936) for the principle that "the obligations of contracts must yield to a proper exercise of the police power." Respondents submit that the State through the proper exiercise of its police power enacted Code 22-4A-7(b)(4) and that if there were a contract right at the time of enactment, as Petitioners suggest, it must yield to the good of all of the State's citizens. However, the most correct analysis of the factual situation has been by the tempered wisdom of both lower courts in concluding that no contract right existed until after enactment of the statute. In short, no contractual obligations have been impaired because none existed prior to the enactment of the statute. Any other interpretation would totally void the obvious purpose of the statue, because a lessee of a mineral title previously severed would simply argue that as owner of the mineral interest he had a right to go on the surface and drill as many holes as he could get permitted, and otherwise cut numerous roads and wreck hovoc to any surface, exclusively through his mineral ownership. The West Virginia Legislature saw a need to bring both sides into agreement prior to drilling and has accomplished this rather nicely by Code 22-4A-7(b)(4).

Petitioners use the case of *Short v. Texaco, Inc.* 406 N.E.2d 625 (Ind. 1980), juris noted, *Texaco, Inc. v. Short*, 50 U.S.L.W. 4117 (January 12, 1982) as persuasive for having similar private property rights issues with the present case. In question in the *Short* case, was the Indiana Mineral Lapse Act which provided that severed mineral rights dormant for 20 years, would return to the surface owner. Petitioners rely on the fact that this Court noted jurisdiction in the *Short* case to assert by implication that this Court would find an impairment of contract as well as a taking of property without just compensation. The reverse is true. This Court issued its opinion in *Texaco, Inc. v. Short*, 50 U.S.L.W. 4117 (January 12, 1982) after Petitioners' writ was served on Respondents and the reasoning of the opinion enhances the arguments advanced by Respondents' position.

Specifically, this Court held in the *Short* case that the Mineral Lapse Act did not unconstitutionally impair the obligation of

contracts and found that the leases in question were not executed until *after* the statutory lapse of the mineral rights. This Court then stated the general rule of law in this area that: "The statute cannot be said to impair a contract that did not exist at the time of its enactment." However, and most importantly, this Court held that the right that the mineral owners had to enter a contract, that was subsequently impaired by the statute, was a *property right* and not a contract right.

II.

CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4), OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, AND RULE 3.04 OF THE OPERATIONAL RULES OF THE OIL AND GAS CONSERVATION COMMISSION, REQUIRING THE WRITTEN CONSENT OF THE OWNER(S) OF THE SURFACE FOR THE LOCATION AND DRILLING OF A "DEEP" OIL OR GAS WELL IS VALID UNDER THE CONSTITUTION OF THE UNITED STATES AND DOES NOT AMOUNT TO A TAKING OF VESTED PROPERTY INTERESTS WITHOUT DUE PROCESS OF LAW.

At the outset of this discussion it is incumbent to point out that this is not a taking case at all, but rather one where the exercise of property rights is subjected to an additional statutory requirement, for the public good, prior to its exercise. W. Va. Code 22-4A-7(b)(4) does not take anything from Petitioners but merely requires them to negotiate in good faith so as to obtain the surface owners' consent prior to drilling a "deep well."

Any rights which Petitioners may have to drill oil or gas wells and to recover those commodities from under the subject 96-acre tract remain intact despite the additional requirement of obtaining the surface owners' consent. Respondents contend that good faith negotiation, in most instances, will yield the necessary landowners consent. However, if Petitioners, or others similarly situated, are faced with particularly recalcitrant surface owners and negotiation is not fruitful, a civil action in the county circuit court to obtain the surface owners' consent is a viable alternative.

Further, the Petitioners may be able to produce the desired reserves of oil or gas from adjacent tracts whose surface owners are more cooperative. This is particularly true in light of the mechanisms of pooling and unitization which are available under W. Va. Code 22-4A. If it is crucial to the Petitioners however, that the target formation be tapped at a location beneath the stubborn surface owners' land, this too could often be accomplished through recent breakthroughs in drilling technology such as directional drilling, where the well bore progresses diagonally from an adjacent tract.

Thus, the Petitioners have suffered no diminution in the value of any rights which they are entitled to pursuant to a mineral owner's implied right to use of the surface for deep well production or in the language of taking analysis they have suffered no injury to "distinct investment-backed expectations," *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631 98 S.Ct. 2646 (1978). In fact, Petitioners are left with substantially all they would have had but for W. Va. Code 22-4A-7(b)(4).

Further, Petitioners do not have property rights as pervasive as they seem to indicate. It is simplistic to say that the State cannot take from Petitioners that which the Petitioners never had. In interpreting contracts it is presumed that those who enter into contracts do so with reference to and in contemplation of the law as it exists at the date thereof. *McClintic v. Dunbar Land Co.*, 127 W. Va. 454, 33 S.E.2d 593 (1945); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 66 L.Ed. 595 (1922). The Petitioners obtained, respectively undivided one-half interests in the oil and gas underlying the subject land in June 1973 and in August 1978, both of which dates are subsequent to the effective date of West Virginia Code 22-4A-7(b)(4). Any rights Petitioners acquired to drill on the subject tract did not attach until they held the entire oil and gas leasehold in August, 1978. *Freeman v. Egnor*, 72 W. Va. 830, 79 S.E. 824 (1913); *Paxton v. Benedum - Trees Co.*, 80 W. Va. 187, 94 S.E. 472 (1917).

Hence, it follows that any rights which Petitioners acquired in August 1978, relative to drilling of deep wells were necessarily taken subject to the surface owners' consent provisions of W.

Va. Code 22-4A-7(b)(4) and have never existed in Petitioners' without such requirements. Petitioners took those rights subject to W. Va. Code 22-4A-7(b)(4) rather than 22-4A-7(b)(4) affecting any pre-existing rights. Again, any distinct investment back expectations which Petitioners had must have necessarily contemplated the surface owners' consent required by W. Va. Code 22-4A-7(b)(4). Consequently, Petitioners now have precisely what they bargained for in August, 1978; a right to produce the deep oil and gas sands tempered by the necessity of the surface owners' consent.

Even if Petitioners were able to avail themselves to the benefits of the original severance of one-half of the oil and gas by deed in 1924 (which respondents maintain they cannot), which admittedly predated W. Va. Code 22-4A-7(b)(4), it does not follow that they hold an unqualified right to use the surface of the subject tract to produce the deep strata below. It is a general rule of the interpretation of deeds that the intent of the parties should be determined while taking into consideration the subject matter, the situation of the parties, and the circumstances surrounding them, *White v. Bailey*, 65 W. Va. 573, 64 S.E. 1019 (1909).

Petitioners choose to base their asserted rights at least in large part, on the original severance of oil and gas from the surface estate. Such asserted rights must then be determined in accordance with the intention of the parties at the time of such severance.

A grant of an undivided one-half interest of the oil and gas in 1924 was not likely to have contemplated production from deep wells which were only made possible by recent technological advances in drilling methods. Further, new drilling and production methods, such as enhanced recovery projects which use numerous wells to pressurize an oil and gas bearing strata, often create demands on the surface over and above that which would be required for more traditional shallow wells and also increase the potential for pollution problems such as contamination or loss of drinking water, erosion, stream sedimentation, and migration of well fluids. This is due to, *inter alia*, the higher number of wells, larger surface areas required to be cleared, and higher well pressures.

Interpreted reasonably, the deed severing the oil and gas would have contemplated production from shallow formations, using the methods of drilling and production then available or which were to come of age in the forseeable future. For an oil and gas driller today to claim virtually unlimited use of the land surface with todays far flung technology based on a deed executed in "Model A" times is to take unfair advantage of what was unknown and unexpected in the past. Petitioners' distinct investment backed expectations based on this early deed remain completely intact, whereas their ability to drill shallow wells is unaffected by W. Va. Code 22-4A-7(b)(4).

Similar reasoning was used to uphold a Tennessee statute which required the surface owners' consent prior to the issuance of a surface mining permit in *Doochin v. Rackley*, 610 S.W.2d 715 (Tenn. 1981). There the Tennessee Supreme Court found that the contract which severed the minerals from the surface did not comtemplate surface mining, whereas surface mining was unknown in the area in which the land was located at the time of the severence.

It should be noted that the Court of Appeals of Kentucky declared unconstitutional a statute requiring that an application for a strip mining permit be accompanied by a statement of consent signed by each holder of a freehold interest in the land. *Dept. for Natural Resources and Environmental Protection v. No. 8 Limited of Virginia*, 528 S.W.2d 684 (Ky. 1975). That court found that such statute could not be justified as a legitimate exercise of the police power and was unconstitutional in that its primary purpose and effect was to change relative legal rights and economic bargaining positions of many private parties under their contracts rather than achieve any public purpose.

Respondent makes the following arguments to distinguish this Kentucky case from the present appeal. First, the Kentucky courts have long made a distinction between the relative rights of surface coal owners and oil and gas owners. Note, *Kentucky's Experience with the Broad Form Deed*, 63 Ky.L.J. 107, 134-135 (1975); *Wiser Oil Co. v. Conley*, 346 S.W.2d 718 (Ky. 1960). Secondly, the Court of Appeals in the No. 8 Ltd. case, *supra* at 686, relied heavily upon the case of *Martin v. Kentucky Oak Mining Co.*, 429 S.W.2d 395 (Ky. 1968) where the West Vir-

ginia common law of mining rights was distinguished from Kentucky law. Thirdly, while the consent provision in the Kentucky strip mine law could effect a total prohibition of mining, West Virginia Code 22-4A-7(b)(4), as described in the previous analysis, does not cause a dimunition in value of the oil and gas. Lastly, the No. 8 Ltd. case was decided prior to the United States Supreme Court's ruling in *Penn Central Transportation Co. v. New York City, supra,* and fails to analyze the issue in terms of current "taking" law.

Traditional taking analysis does not divide affected rights into discreet segments, but rather considers the estate as a whole. *Penn Central Transportation Co. v. New York City, supra.* Petitioners seek to divide their oil and gas interests in the subject tract into the discreet segments of "shallow" and "deep" wells for purposes of determining the taking issue. A logical extension of this reasoning would require additional subdivision of the deep well category into those where the surface owners consent readily, those where they would not consent at all, and a miriad of other various positions between those two extremes. This serves only to obscure the issue.

Petitioners also rely heavily on this Court's acceptance for review of *Short v. Texaco, Inc.*, 406 N.E.2d 625 (Ind. 1980), juris noted, *Texaco, Inc. v. Short*, 50 U.S.L.W. 4117 (January 12, 1982), which concerns the constitutionality of the Indiana Mineral Lapse Act, to persuade this Court to review the present case. Petitioners assert that the effects of the contested statutes in *Short* and the present case are the same and that if this Court should review *Short*, it should likewise hear this case. This court found in *Texaco, Inc. v. Short*, 50 U.S.L.W. 4117 (January 12, 1982) that the Indiana Mineral Lapse Act was a reasonable exercise of the police power of the state and was not a taking of property without due process of law. It is admitted that the surface owners' consent requirements of West Virginia Code 22-4A-7(b)(4) are far less intrusive in effect than the Indiana Mineral Lapse Statute and that it is also a reasonable exercise of the police power of the state. Subject to the Indiana statute the mineral owner may lose the entire mineral estate whereas under West Virginia Code 22-4A-7(b)(4) the petitioners maintain that which they held before but subject only to an additional requirement. In both statutes, the respective states are requiring

only minimal additional requirements for the protection of property interests.

III.

THIS CASE IS NOT RIPE FOR ADJUDICATION ON THE ISSUES OF WHETHER CHAPTER 22, ARTICLE 4A, SECTION 7(b)(4), OF THE WEST VIRGINIA CODE OF 1931, AS AMENDED, CONSTITUTES A "TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW" OR "IMPAIRS CONTRACTS."

Respondents contend that this case is not ripe for adjudication on either impairment of contract or taking grounds due to the inadequacy of the factual record presented. Petitioners did not acquire their asserted contract and property rights until after the effective date of West Virginia Code 22-4A-7(b)(4), hence this case does not present a proper factual basis on which to determine the constitutionality of West Virginia Code 22-4A-7(b)(4) on "taking" or impairment of contract grounds.

Inadequate evidence is in the record to determine the extent of any deprivations, if any, which Petitioners have suffered due to West Virginia Code 22-4A-7(b)(4). The record does not show whether Petitioners can produce the deep oil and gas strata under the subject tract by alternative means, as discussed previously, nor does it reveal the extent of any efforts by Petitioners to acquire the requisite surface owners' consent so as to comply with the statute. These facts, and others not on the record are necessary for a proper application of either "taking" or impairment of contract analysis to the case at bar.

Without the factual information above, a concrete controversy is not presented to the court and Petitioners' case amounts to a mere facial challenge to the subject statute. This Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc., et al*, 49 U.S.L.W. 4654, 4662 (June 15, 1981) stated that such a facial challenge would lie only if the statute "denies the owner economically viable use of his land." Respondent submits that West Virginia Code 22-4A-7(b)(4) does not do so.

CONCLUSION

Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari based on the foregoing authority and argument.

Respectfully submitted,

WALTER N. MILLER, Director, West Virginia Department of Mines,

ROBERT L. DODD, Deputy Director, West Virginia Department of Mines, Oil and Gas Division, and

THOMAS E. HUZZEY, Commissioner, West Virginia Oil and Gas Conservation Commission,
By Counsel

CHAUNCEY H. BROWNING
ATTORNEY GENERAL
STATE OF WEST VIRGINIA

NICHOLAS W. JOHNSON
DEPUTY ATTORNEY GENERAL

B. KEITH HUFFMAN
ASSISTANT ATTORNEY GENERAL

Office of Attorney General
Capitol Building
Charleston, West Virginia 25305
(304) 348-0546